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9
10 UNITED STATES DISTRICT COURT
11 FOR THE NORTHERN DISTRICT OF CALIFORNIA
12

13
14 GREGORY COFFENG, MARK GLASER
and JORDAN WILSON, individually and on
15 behalf of all others similarly situated,

16 Plaintiffs,

17 v.

18
19 VOLKSWAGEN GROUP OF AMERICA,
INC.,

20 Defendant.
21
22

Case No. 17-cv-01825-JD

**PLAINTIFFS' UNOPPOSED NOTICE OF
MOTION AND MOTION FOR
PRELIMINARY APPROVAL OF CLASS
ACTION SETTLEMENT;
MEMORANDUM OF POINTS AND
AUTHORTIES**

DATE: October 25, 2018
TIME: 10:00 a.m.
JUDGE: Hon. James Donato
CRTRM: 11, 19th Floor

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1 **TO ALL PARTIES AND THEIR COUNSEL OF RECORD:**

2 **PLEASE TAKE NOTICE THAT** on October 25th, 2018 at 10:00 a.m., before the
3 Honorable James Donato, United States District Judge, at Courtroom 11, 19th Floor, of the United
4 States District Court for the Northern District of California, 450 Golden Gate Avenue, in San
5 Francisco, California, or at such other time or place as this Court may Order, Plaintiffs Gregory
6 Coffeng, Mark Glaser, and Jordan Wilson, by and through their undersigned counsel, will and do
7 hereby move this Court in unopposed fashion for an Order granting Preliminary Approval of the
8 classwide Proposed Settlement reached in this matter. A copy of the Settlement Agreement is
9 attached as Exhibit A to the Declaration of Gary S. Graifman filed herewith. A copy of the
10 proposed Preliminary Approval Order sought to be entered by this Court is attached as Exhibit 3
11 to the Settlement Agreement. This unopposed motion is based on the accompanying
12 Memorandum in Support, Declaration of Gary S. Graifman, Esq., including the Settlement
13 Agreement which is attached thereto including all of its exhibits, any argument of counsel, and
14 such additional material as this Court may consider.

15 **STATEMENT OF ISSUES TO BE DECIDED**

16 1. Whether the putative Class, defined *infra*, should be certified for settlement
17 purposes, with Plaintiffs being appointed Class Representatives and Plaintiffs' counsel being
18 appointed Lead Settlement Class Counsel and Class Liaison Counsel.

19 2. Whether preliminary approval of the Settlement, defined *infra*, should be granted.

20 3. Whether the proposed Notice, defined *infra*, of the Settlement should be
21 disseminated to the putative Class.

22 **MEMORANDUM OF POINTS AND AUTHORITIES**

23 **I. INTRODUCTION**

24 Counsel for Plaintiffs and Defendant in the above-entitled action are pleased to report that,
25 following significant and intensive arm's length settlement negotiations, over approximately the
26 past five months, the parties have reached a proposed classwide settlement (the "Settlement") to
27 resolve this action. A copy of the parties' Settlement Agreement is attached as Exhibit A to the
28

1 Declaration of Gary S. Graifman in Support of Plaintiffs' Unopposed Motion for Preliminary
2 Approval of Class Action Settlement ("Graifman Decl.").

3 Pursuant to Federal Rule of Civil 23, Plaintiffs now file this unopposed motion for
4 preliminary approval, so that: and (i) notice of the proposed Settlement can be disseminated to the
5 absent Class Members; (ii) the absent Class Members can be given an opportunity to avail
6 themselves of the Settlement, opt-out of the Settlement Class, or file any objections to the
7 proposed Settlement. *See* Fed. R. Civ. P. 23(e)(1) (directing that any notice of class action
8 settlement may only be disseminated with prior court approval); *see also Jaffe v. Morgan Stanley*
9 *& Co., Inc.*, No. C 06-3903 THE, 2008 WL 346417, at*11 (N.D. Cal. Feb. 7, 2008) (Henderson,
10 J.) (once court grants preliminary approval it is proper to stay and enjoin members of settlement
11 class from litigating before this or other courts matters covered by proposed settlement).

12 This unopposed motion for preliminary approval also seeks to set a date for the Final
13 Approval and Fairness Hearing on the proposed Settlement. *See* Settlement Agreement, at ¶
14 IX(A). At the Final Approval Hearing, the Court will have the opportunity to determine whether
15 to grant final approval to the class action settlement, as well as to evaluate any objections to the
16 Settlement that may have been filed. *See* Fed. R. Civ. P. 23 (e)(2) (directing that a class action
17 settlement that purports to bind absent class members may only be entered after hearing held by
18 the court). Annexed as Exhibit B to the Graifman Decl. for the Court's convenience is a proposed
19 schedule of dates calculated on the assumption that the Preliminary Approval Order would be
20 entered on October 25, 2018. Exhibit B is based on the pertinent dates contemplated in the
21 Settlement Agreement (obviously if the Order is entered after that date, the dates on Exhibit B
22 should be extended accordingly).

23 The unopposed motion for preliminary approval should be granted. The Settlement
24 reached is unquestionably fair, reasonable and adequate—it provides Class Members with a
25 meaningful warranty extension and robust reimbursement for pre-notice repair costs they incurred
26 to replace the allegedly defective primary engine water pump that forms the basis of the CAC. *See*
27 Settlement Agreement, at ¶¶ II(A), (B) and (C). Under the warranty extension, Defendant
28 Volkswagen Group of America, Inc. ("VWGoA") will extend the New Vehicle Limited Warranty

1 (“NVLW”) applicable to the Settlement Class Vehicles to cover repair or replacement of a failed
2 primary engine water pump, by an authorized Volkswagen or Audi dealer, for a period of 10 years
3 or 100,000 miles, whichever occurs first, from the vehicle’s In-Service Date, subject to certain
4 terms and conditions. *Id.* This warranty extension almost doubles the 5 years or 60,000 miles
5 (whichever occurs first) durational limit of VWGoA’s original NVLW. The proposed Settlement,
6 therefore, provides meaningful redress for the claims and allegations pled in the Consolidated
7 Amended Complaint (the “CAC”).

8 The gravamen of the CAC is that VWGoA allegedly withheld material disclosures
9 concerning claimed defective primary engine water pump components known to VWGoA and
10 used in the following vehicles (hereinafter “Settlement Class Vehicle(s)”): (i) certain 2008 through
11 and including 2014 model year Audi motor vehicles equipped with the 2.0L TSI or TFSI
12 turbocharged engine; and (ii) certain 2008 through and including 2014 model year Volkswagen
13 motor vehicles equipped with the 2.0L TSI turbocharged engine.¹ Settlement Class Vehicles
14 equipped with 2.0L EA888 TSI or TFSI turbocharged four cylinder multi-valve engines include,
15 but are not limited to, engine codes CCTA, CAEB, CAED and CBFA (hereinafter “class engines”
16 or “class engine”).² VWGoA has maintained, and continues to maintain, that the primary engine
17 water pumps in the Settlement Class Vehicles are not defective; that no warranties (express or
18 implied) or laws (statutory or common) have been violated, and that no wrongdoing has occurred
19 in connection with the water pumps and the Settlement Class Vehicles.

20 The Settlement of this vigorously disputed claim provides substantial benefits both for
21 those Settlement Class Members whose vehicles have already manifested a water pump failure

22 ¹ Because certain vehicles during these model years did not use the allegedly defective water
23 pump component, the Class Vehicles involve certain Vehicle Identification Numbers (“VIN” or
24 “VIN’s”) and Class Members will be able to determine if their VIN is included in the Settlement.
25 (Ex. 4 to Settlements Agreement lists the VIN’s and the Class Vehicles. With the Court’s
26 permission, that Exhibit will be filed under seal because it contains private and confidential
information about the vehicles of the particular Settlement Class members. There are
approximately 800,000 vehicles in the Settlement Class.

27 ² Class Vehicles include the Audi A3, A4, A5 and Q5 together with the Volkswagen CC, Beetle,
28 EOS, Golf/GTI, Jetta, Passat, Sports Wagon and Tiguan, *inter alia*. Class Vehicles were
distributed and warranted by VWGoA in the United States.

1 and been repaired at their owners' expense (reimbursement), and for those Settlement Class
2 Members whose vehicles experience a water pump failure after the date of class notice and within
3 10 years or 100,000 miles (whichever occurs first) from the vehicle's In-Service Date (warranty
4 extension).

5 Under the reimbursement portion of the Settlement, Class Members who have paid out-of-
6 pocket for repair or replacement of a failed primary engine water pump within eight (8) years or
7 80,000 milers (whichever occurs first) from the vehicle's In-Service Date and prior to the Notice
8 Date, will receive one hundred percent (100%) reimbursement of the paid invoice amount for the
9 repair or replacement, subject to certain adjustments (*e.g.* for good will or full/partial
10 payments/reimbursements received by them under an extended warranty or service contract). *See*
11 Settlement Agreement, at ¶ II(B). Settlement Class Members who have paid out-of-pocket for
12 repair or replacement of a failed primary engine water pump after eight (8) years or 80,000 miles
13 (whichever occurs first) and up to ten (10) years or 100,000 miles (whichever occurs first) of the
14 vehicle's In-Service Date and prior to the Notice Date, will receive seventy percent (70%)
15 reimbursement of the paid invoice amount for the repair or replacement, subject to certain similar
16 adjustments. *See* Settlement Agreement, at ¶ II(B).

17 In addition, if, within 10 years or 100,000 miles (whichever occurred first) of the vehicle's
18 In-Service Date and prior to the Notice Date, a Settlement Class Member paid for the cost of
19 repair/replacement of a damaged engine that was caused by the failure of the water pump, he/she
20 may be entitled to a graduated percentage of reimbursement of the out-of-pocket expenses based
21 on the following schedule:

Time from in- service date	Less than 50,000 miles	50,001 to 60,000 miles	60,001- 70,000 miles	70,001- 80,000 miles	80,001 to 100,000 miles
4 years	100% ³	70%	50%	40%	25%

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28 ³ Under original warranty.

1	4-5 years ⁴	70%	50%	40%	30%	20%
2						
3	5-6 years	50%	40%	35%	25%	15%
4	6-7 years	40%	30%	25%	20%	10%
5						
6	7-8 years	30%	25%	20%	15%	10%
7						
8	8-10 years	25%	20%	15%	10%	5%

9 The reimbursement provision of the Settlement Agreement for failed water pumps applies
10 regardless of whether the repair was made by an authorized VW or Audi dealership or at an
11 independent service center of the Settlement Class Member's choice. *Id.* at ¶ II(B)(1)(c) (although
12 if made at an independent service center and not an authorized dealer, the amount for such
13 reimbursement is capped at \$950.00 if it is subject to the 100% reimbursement, and 70% of that
14 amount if subject to the 70% reimbursement).

15 Notably, the overall settlement consideration is not subject to any aggregate monetary cap,
16 proration, or other allocation. In addition to the foregoing substantive relief, under the Settlement
17 Agreement VWGoA will bear the cost of the class notice, claims administration, and awarded
18 attorneys' fees and expenses. *Id.* at ¶¶ IV(A) and (B). By any objective standard, the Settlement
19 warrants preliminary approval. Indeed, such automotive classwide settlements that provided a
20 cash reimbursement or prospective warranty extension option have been granted final approval by
21 California federal courts. *See Sadowska v. Volkswagen Group of America, Inc.*, No. CV 11-665,
22 2013 WL 9600948, at *3 (C.D. Cal. Sept. 25, 2013) (granting final approval to nationwide class
23 settlement that called for defendant car manufacturer to extended warranty to lesser of 10 years or
24

25 ⁴ For VW Settlement Class Vehicles in which the New Vehicle Limited Warranty period is 5 years
26 or 60,000 miles (whichever occurs first) from the In-Service Date, the reimbursement percentage
27 shall be one hundred percent (100%) for unreimbursed out-of-pocket expenses incurred within the
28 said 5 years or 60,000 miles (whichever occurs first) warranty period, but not exceeding the
maximum reimbursement amount of \$4,000.00 if the repair/replacement was performed by an
independent service center and not an authorized VW dealer (Paragraph 2 above).

1 100,000 miles and offer reimbursement for repairs already undertaken); *Browne v. American*
2 *Honda Motor Co.*, Case No. CV 09-06750 MMM (DTBx), 2010 WL 9499072, at *4 (C.D. Cal.
3 Jul. 29, 2010) (granting final approval to nationwide class settlement that provided coverage for
4 future brake repairs for a period of up to three years or a reimbursement option covering up to 50
5 percent of repair costs already undertaken).

6 The notice of the proposed Settlement also fully complies with Rule 23 and due process
7 concerns, as it fully advises Settlement Class Members of their rights under the Settlement, and is
8 to be disseminated individually through the United States mail. *See* Ex. 5 to Settlement
9 Agreement (proposed form of Notice); Settlement Agreement, at ¶¶ V(b)(1), (2) and (3) (calling
10 for Settlement Administrator to disseminate individual Notice of the Proposed Settlement to
11 identifiable members of settlement class via United States mail). Additionally, to account for
12 Settlement Class Members whose current address may not be readily identifiable, the Settlement
13 Agreement also calls for the dissemination of the Notice on a Settlement website. *See* Settlement
14 Agreement, at ¶ V(b)(6) (calling for publication of a settlement website containing the notice).

15 Certification of a Settlement Class for settlement purposes only is also worthy of
16 preliminary approval. Here, the Settlement Class definition closely tracks the putative class
17 definition alleged in the CAC. *Compare* Settlement Agreement, at ¶ I(Q) (Settlement Class
18 definition) *with* CAC, at ¶ 14 (putative class defined in complaint). As detailed below, moreover,
19 Plaintiffs meet the Rule 23 criteria for conditional certification of the Settlement Class for
20 settlement purposes only.

21 **II. PRELIMINARY APPROVAL SHOULD BE GRANTED**

22 **A. The Settlement Class Should Be Conditionally Certified**

23 This is a putative class action, and as such, the proposed Settlement Agreement calls for
24 certification of a Settlement Class for settlement purposes only. *See* Settlement Agreement, at ¶
25 1(Q) (defining Settlement Class). The use of such settlement classes is common and proper in the
26 resolution of class action litigation. *See, e.g., Gribble v. Cool Transports, Inc.*, Case No. CV 06-
27 04863 GAF (SHx), 2008 WL 5281665, at * 3, (C.D. Cal. Dec. 15, 2008) (approving settlement
28

1 class as part of final approval of class action settlement); *In re Connecticut General Life Ins. Co.*,
2 No. Civ. S-07-0819 RRB EFB, 1997 WL 910387, at *1 ¶ 2 (C.D. Cal. Feb. 13, 1997) (certifying
3 “for purposes of settlement, the Settlement Class defined in Section II and Exhibit E of the
4 Settlement Agreement”); *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust*
5 *Litig.*, No. MDL 150, 1993 WL 39306, at *2 (C.D. Cal. Jan. 12, 1993) (granting preliminary
6 approval and certifying “for purposes of this settlement only, Temporary Settlement Classes as
7 defined in the Settlement Agreement.”).

8 Here, subject to certain exclusions, the Settlement Class is defined as: “All persons and
9 entities who purchased or leased a Settlement Class Vehicle, as defined in Section I (R) of this
10 Agreement, in the United States of America and Puerto Rico.” Settlement Agreement, at ¶ I(Q).
11 Settlement Class definition sets forth an identifiable class, and generally tracks the putative class
12 definition originally pled in the CAC. *See* CAC, at ¶¶ 1 and 2 (alleging class definition).

13 1. The Settlement Class Satisfies The Numerosity Requirement.

14 Rule 23 (a)(1) requires that “the class [be] so numerous that joinder of all members is
15 impracticable.” Fed. R. Civ. P. 23 (a)(1). It is undisputed that this action meets the numerosity
16 requirement. Material obtained by Plaintiffs’ counsel during discovery in this action confirms that
17 approximately 800,000 Settlement Class Vehicles were manufactured and distributed within the
18 United States. Unquestionably, this more than satisfies the numerosity requirement for class
19 certification. *See Lowdermilk v. United States Bank National Assoc.*, 479 F.3d 994, 997 (9th Cir.
20 2007) (numerosity criteria satisfied by plaintiff’s mere allegation that class size “exceeds 30
21 persons.”).

22 2. The Settlement Class Satisfies The Commonality Requirement.

23 Rule 23 (a)(2) requires that “there [be] questions of law or fact common to the class.” Fed.
24 R. Civ. P. 23 (a)(2). “To establish commonality, ‘[t]he existence of shared legal issues with
25 divergent factual predicates is sufficient, as is a common core of salient facts coupled with
26 disparate legal remedies.’” *Parra v. Bashas, Inc.*, 536 F.3d 975, 978 (9th Cir. 2008) (quoting
27 *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998)). Here, this commonality
28 requirement is met because the claims of all absent class members arise from the same allegation

1 in the CAC, namely, does there exist a defect in the Settlement Class Vehicles' primary engine
2 water pump?

3 Further, the Settlement Class also shares this commonality requirement in that all
4 Settlement Class Members whose vehicles experience the manifestation of the alleged common
5 defect (a water pump failure) are entitled to relief if their claim meets the requirements of the
6 Settlement. This is so because a key provision of the Settlement Agreement permits eligible
7 members to obtain reimbursement from VWGoA for certain out-of-pocket costs previously
8 incurred by the Settlement Class Member in having to replace the original primary engine water
9 pump within the time and mileage parameters of the Settlement. *See* Settlement Agreement, at ¶¶
10 II(B) and (C) (detailing settlement consideration).

11 3. The Settlement Class Satisfies The Typicality Requirement.

12 Rule 23 (a)(3) requires that “the claims or defenses of the representative parties are typical
13 of the claims or defenses of the class.” Fed. R. Civ. P. 23(a)(3). “The typicality prerequisite of
14 Rule 23(a) is fulfilled if ‘the claims or defenses of the representative parties are typical of the
15 claims or defenses of the class.’” *Simpson v. Fireman’s Fund Ins. Co.*, 231 F.R.D. 391, 396 (N.D.
16 Cal. 2005) (quoting *Hanlon*, 150 F.3d at 1020). “[R]epresentative claims are ‘typical’ if they are
17 reasonably co-extensive with those of absent class members; they need not be substantially
18 identical.” *Hanlon*, 150 F.3d at 1020. In determining whether typicality is met, the focus should
19 be “‘on the defendants’ conduct and plaintiff’s legal theory,’ not the injury caused to the plaintiff.
20 *Simpson*, 231 F.R.D. at 396 (quoting *Rosario v. Livaditis*, 963 F.2d 1013, 1018 (7th Cir.1992)).
21 Typicality does not require that “all class members suffer the same injury as the named class
22 representative.” *Id.*

23 The typicality criteria are satisfied in this case. Plaintiffs Gregory Coffeng, Mark Glaser,
24 and Jordan Wilson own vehicles equipped with the water pumps alleged in the CAC and
25 experienced a manifestation of the alleged defect that required repairs at costs that varied among
26 the Plaintiffs. *See* CAC, at ¶¶ 10-12. Because Plaintiffs are members of the proposed Settlement
27 Class, and assert the same causes of action on behalf of themselves and all absent class members,
28 their CAC and the Settlement Class meet the typicality requirement for class certification.

1 **4. The Settlement Class Satisfies The Adequacy Requirement.**

2 Rule 23 (a)(4) requires that “the representative parties will fairly and adequately protect the
3 interests of the class.” Fed. R. Civ. P. 23(a)(4). “Resolution of two questions determines legal
4 adequacy: (1) do the named plaintiffs and their counsel have any conflicts of interest with other
5 class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously
6 on behalf of the class?” *Hanlon*, 150 F.3d at 1020. There are no conflicts of interest alleged or
7 that could possibly exist here. Plaintiffs seek the same remedy as all class members; namely,
8 relief to address the claim that the vehicle has manifested or is unduly prone to manifest a failure
9 of the primary engine water pump. Plaintiffs’ interests, therefore, are fully aligned with the
10 interests of the Settlement Class members.

11 Further, all Plaintiffs and their counsel are adequate class representatives. This is
12 evidenced, in the first instance, by the fact that Plaintiffs and their counsel have managed to
13 negotiate this Settlement Agreement with VWGoA, so as to grant meaningful relief to the class.
14 Counsel for Plaintiffs are highly experienced in class action litigation, and have been involved in
15 many class actions and settlements. *See* Exs. C-E to the Graifman Decl. (resumes of class
16 counsels’ law firms)⁵. Their track record in this action before this Court evidences their adequacy
17 to serve as Class counsel.

18 **5. The Settlement Class Satisfies The Necessary Criteria Of Rule 23(b).**

19 In addition to meeting all the class certification requirements enumerated in Rule 23(a), a
20 movant must also satisfy at least one of the requirements of Rule 23(b). *See Zinser v. Accufix*
21 *Research Int., Inc.* 253 F.3d 1180, 1886, *amended* 273 F.3d 1266 (9th Cir. 2001). Here, the
22 Settlement provides monetary relief, and the criteria set forth in Rule 23(b)(3) is pertinent. This
23 section provides that class certification is appropriate if the criteria of Rule 23(a) are met, and if:

24 [T]he court finds that the questions of law or fact common to class
25 members predominate over any questions affecting only individual
26 members, and that a class action is superior to other available
methods for fairly and efficiently adjudicating the controversy.

27 ⁵ Exhibit C to the Graifman Decl. is the firm resume of Kantrowitz, Goldhamer & Graifman, P.C.;
28 Exhibit D is the firm resume of the Law Offices of Thomas P. Sobran, P.C.; and Exhibit E is the
firm resume of Stull, Stull & Brody.

1 Fed. R. Civ. P. 23(b)(3).

2 The “predominance” and “superiority” requirements of Rule 23(b)(3) are readily met in
3 this case. “To establish predominance of common issues, a party seeking class certification is not
4 required to show that the legal and factual issues raised by the claims of each class member are
5 identical. Rather, the predominance inquiry focuses on whether the proposed class is ‘sufficiently
6 cohesive to warrant adjudication by representation.’” *Friedman v. 24 Hour Fitness USA Inc.*, CV
7 06-6282 AHM (CTx), 2009 WL 2410889, at *6 (C.D. Cal. Aug. 6, 2009) (*quoting Local Joint*
8 *Executive Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1162
9 (9th Cir. 2001)). Here, this cohesiveness assuredly exists because the overarching inquiry and
10 interest of all putative class members is whether the members of the Settlement Class are entitled
11 to relief from VWGoA for an alleged defect in the primary engine water pump present in their
12 particular Settlement Class Vehicle. This evidence and proof as to the existence of a legally
13 cognizable claim to obtain such relief, therefore, would predominate over any individual issues in
14 adjudicating this case.

15 Similarly, the “superiority” requirement of Rule 23(b)(3) is also satisfied in this case. In
16 determining the superiority of a class action, courts consider the following four factors: (1) the
17 class members’ interests in individually prosecuting separate actions; (2) whether any litigation
18 concerning the controversy has already been brought by class members; (3) the desirability of
19 concentrating the litigation of the claims in the particular forum; and (4) the likely difficulties in
20 managing a class action.⁶ *See* Fed. R. Civ. P. 23(b)(3)(a)-(d). Here, those factors clearly militate
21 in favor of class certification. Although the cost of repairing or replacing a failed primary engine
22 water pump is significant, the cost of individually litigating such a case against VWGoA would
23 easily exceed the cost of any relief that could be obtained by any lone owner and lessee. This,
24 alone, warrants a finding that a class action is a superior method of adjudication. *See Tchoboian v.*

25
26 ⁶ Manageability is a factor to assess in deciding whether the superiority requirement has been met
27 when class certification is sought as part of an adversarial trial process. By contrast, “a settlement
28 class need not be ‘manageable’ as a trial class action because no trial will occur.” *Browning v.*
Yahoo! Inc., Case No. C04-01463 HRL, 2007 WL 4105971, at *9 (N.D. Cal. Nov. 16, 2007)
(*citing Amchem Prods. v. Windsor*, 521 U.S. 591, 619 (1997)).

1 *Parking Concepts, Inc.*, 2009 WL 2169883, at *7 (C.D. Cal. Jul. 16, 2009) (Selna, J.) (granting
2 motion for class certification and noting that “[t]his superiority inquiry requires a comparative
3 evaluation of alternative mechanisms of dispute resolution.”); *Baghdasarian v. Amazon.com, Inc.*,
4 Case No. CV 05-8060 AG (CTx), 2009 WL 2263581, at *7 (C.D. Cal., Jul. 7, 2009) (granting
5 motion for class certification and noting that the superiority inquiry is geared to address “the
6 problem that small recoveries do not provide the incentive for any individual to bring a solo action
7 prosecuting his or her rights.”).

8 Because the proposed Settlement Class meets all the applicable requirements for
9 certification under Federal Rule of Civil Procedure 23, the class should be conditionally certified
10 for purposes of settlement. At the Fairness Hearing, the Court will have further opportunity to
11 revisit this conditional certification in deciding whether to grant Final Approval to the Settlement
12 Agreement and certification of the Settlement Class.

13 **B. The Notice Plan Should Be Approved.**

14 Rule 23 and due process concerns require notice to be provided to absent class members in
15 order to inform them of the proposed Settlement, and grant them the opportunity to opt-out or
16 object. *See* Fed. R. Civ. P. 23(c)(2). The notice and means of disseminating it must be the “best
17 notice practicable” under the circumstances. *See Mullane v. Central Hanover Trust*, 339 U.S. 306,
18 314 (1950). Here, the parties propose to disseminate the notice (“Notice”) of the proposed Class
19 Action Settlement individually, by way of United States mail to the last known address of the
20 absent Class Members for which the Class Member’s identity and address are reasonably
21 ascertainable from industry-recognized databases. *See* Settlement Agreement, at ¶¶ V(b)(1)-(3)
22 (setting forth Notice Plan and notice terms under the Settlement Agreement). The Claims
23 Administrator will use the same company to acquire the names and addresses of Settlement Class
24 Vehicle owners as manufacturers use to aggregate that data for recall notices. *See* Settlement
25 Agreement, at ¶ V(b)(2). Such individual service of notice via the U.S. mail has been held, as a
26 matter of law, to satisfy the due process concerns and to meet the “best practicable notice”
27 standard. *See In re Laser Arms Corp. Securities Litig.*, 794 F. Supp. 475, 496 (S.D.N.Y. 1979)
28

1 (“Therefore, the Court finds that notice by first class mail is the ‘best practicable notice.’”); *Peil v.*
2 *National Semiconductor Corp.*, 86 F.R.D. 357, 375 (E.D. Pa. 1980) (“In the present case, the best
3 notice practicable would apparently be obtained by a first class mailing.”). Moreover, the
4 Settlement Agreement calls for the Settlement Administrator to establish a website with Notice of
5 the Settlement and to post the Notices for VW and Audi Class Members on both. *See* Settlement
6 Agreement, at ¶ V(b)(6).

7 The proposed form of Notice also complies with due process requirements and Rule 23.
8 The form Notices for VW and Audi Class Members are both attached as Exhibit 5 to the
9 Settlement Agreement, and the Notices inform absent Class Members as to the terms of the
10 Settlement, their right to avail themselves of the Settlement, opt-out, or object, procedures to
11 follow and applicable deadlines, as well as the binding effect of the Settlement upon Members of
12 the Settlement Class who do not opt-out. *See* Ex. 5 to Settlement Agreement. The VW and Audi
13 forms of Notice and the proposed plan of dissemination should, therefore, also be approved.

14 **C. The Substantive Terms of the Settlement Are Fair, Reasonable**
15 **and Adequate, and Should Be Granted Preliminary Approval**

16 Preliminary approval should also be granted to the Settlement because its terms are fair,
17 reasonable and adequate. Ultimately, the decision as to whether to grant preliminary approval to a
18 settlement of a class action is a matter left to the discretion of the trial court. *See Castro v. Zenith*
19 *Acquisition Corp.*, 2007 WL 81905, at *1 (N.D. Cal. Jan. 9, 2007). In exercising that discretion,
20 however, the Court should bear in mind that “there is an overriding public interest in settling and
21 quieting litigation,” and this is “particularly true in class action suits.” *Van Bronkhorst v. Safeco*
22 *Corp.*, 529 F.2d 943, 950 (9th Cir. 1976). Recognizing that a settlement represents an exercise of
23 judgment by the negotiating parties, *Torrisi v. Tucson Elec. Power*, 8 F.3d 1370, 1375 (9th Cir.
24 1993), the Ninth Circuit has held that “the court’s intrusion upon what is otherwise a private
25 consensual agreement negotiated between the parties to a lawsuit must be limited to the extent
26 necessary to reach a reasoned judgment that the agreement is not the product of fraud or
27 overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a

1 whole, is fair, reasonable and adequate to all concerned.” *Officers for Justice v. Civil Service*
2 *Comm’n*, 688 F.2d 615, 625 (9th Cir. 1982).

3 The general standard by which courts are guided when deciding whether to grant
4 preliminary approval to a class action settlement is whether the proposed settlement falls within
5 the range of what could be “fair, adequate, and reasonable,” so that notice may be given to the
6 proposed class, and a hearing for final approval may be scheduled. *Class Plaintiffs v. Seattle*, 955
7 F.2d 1268, 1276 (9th Cir. 1992); *see also Gattreaux v. Pierce*, 690 F.2d 616, 621 n.3 (7th Cir.
8 1982) (If the court finds that the proposed settlement is “within the range of possible approval”
9 and that notice should be given, “the next step is the fairness hearing.”).

10 This proposed Settlement assuredly satisfies the foregoing criteria. The terms of the
11 Settlement provide Settlement Class Members with meaningful relief that addresses the precise
12 legal injury that was alleged in the CAC. The recovery in this Settlement is substantial. Each
13 qualifying Settlement Class Member may be entitled to receive hundreds and potentially
14 thousands of dollars to reimburse the cost of vehicle repair. Eligible Settlement Class Members
15 also are provided a warranty extension benefit for the primary engine water pump that almost
16 doubles the duration of the original VWGoA New Vehicle Limited Warranty. Settlement
17 Agreement, ¶ II(A).

18 By any measure, the Settlement terms are fair, adequate and reasonable. But this is
19 particularly true when considered in light of the uncertain prospects and risks faced by Plaintiffs
20 and the putative class. This is an arm’s length Settlement of a vigorously disputed claim.
21 VWGoA maintains that the water pump is not defective and that no warranties or laws (statutory
22 or common) have been violated. VWGoA vigorously denies any liability or wrongdoing, and
23 intends to vigorously contest not only the ultimate liability and claim for damages, but also
24 Plaintiffs’ anticipated motion for class certification. Although Plaintiffs remained confident in the
25 merits of their case, the results were not predictable with any degree of certainty. In addition,
26 VWGoA reserved the right to appeal any class certification or ultimate decision entered against it.
27 An appeal to the Ninth Circuit would likely take an extended period of time to resolve, such that,
28

1 even if successful, it would mean that ultimate relief to the class would likely be substantially
2 delayed.

3 The notice terms of the proposed Settlement readily satisfy fairness and due process
4 requirements because they call for personal notice *via* United States mail on all identifiable
5 Settlement Class Members and the Notice apprises the Settlement Class Members of the
6 Settlement terms and Class Members' options. *See* Settlement Agreement, at ¶¶ V(b)(1)–(3)
7 (imposing on Defendant obligation to effect Notice on Settlement Class Members by United States
8 mail); Ex. 1 to Settlement Agreement (proposed form of Notice).

9 **D. The Settlement Was the Product of Adversarial Arm's-Length**
10 **Negotiation.**

11 That the discussions and negotiations leading up to the Settlement were conducted in
12 vigorous, adversarial, and arm's-length fashion also serve as added indicia of the fairness of the
13 settlement. Here, settlement negotiations were not even broached in earnest until the parties had
14 exchanged meaningful informal discovery and fully briefed and argued a Motion to Dismiss and,
15 after the hearing on Defendants' Motion, Amendment of the Complaint, and Plaintiffs' counsel
16 consulted with automotive experts. These actions all occurred prior to engaging in settlement
17 talks. At the point of settlement discussions, each side had a *bona fide* basis on which to make an
18 informed assessment of the value, strengths, and potential weaknesses of their respective case and
19 defenses.

20 Further, it is undeniable that the settlement negotiations here were non-collusive and
21 adversarial in nature. Indeed, the parties engaged in extended negotiations during which several
22 extensions of time were required and granted by the Court. Furthermore, as of the filing of this
23 Motion for Preliminary Approval, counsel have not begun any negotiations on the issue of
24 reasonable attorneys' fees and incentive awards. Thus further attesting to the adversarial, *bona*
25 *fide*, and arm's-length nature of the negotiations. *Id.*

26 Because the proposed Settlement amounts to a reasonable means of resolving this
27 litigation, and because the risks and expenses inherent in continuing to litigate this matter are
28 significant and uncertain, this proposed settlement should be preliminarily approved.

1 **III. CONCLUSION**

2 For all the foregoing reasons, Plaintiffs respectfully request that the unopposed motion for
3 preliminary approval be granted.

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5 STULL, STULL & BRODY

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